

STATE OF MICHIGAN
COURT OF APPEALS

LAURIE ANN MILLER,

Plaintiff-Appellee,

v

ALEXANDER LEE MILLER,

Defendant-Appellant.

UNPUBLISHED
September 2, 2014

No. 320238
Lapeer Circuit Court
LC No. 12-045653-DM

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right a divorce judgment that awarded plaintiff sole legal and physical custody of the parties' two minor children, suspended defendant's parenting time, awarded plaintiff spousal support, and that directed defendant to pay attorney fees to plaintiff's counsel. We affirm.

On September 13, 2012, plaintiff filed a complaint for divorce. At the same time, plaintiff also filed a motion seeking an ex parte order for temporary sole physical and legal custody of the parties' children (a daughter, d/o/b June 19, 2008, and a son, d/o/b July 22, 2011). Plaintiff further sought the temporary suspension of any parenting time for defendant. Plaintiff alleged that the parties' daughter had recently disclosed incidents of sexual abuse by defendant and that defendant had a pornography addiction that resulted in thousands of dollars in credit card debt. The trial court granted plaintiff's motion, temporarily awarding her sole physical and legal custody of the children and temporarily suspending parenting time for defendant during the pendency of sexual-abuse investigations by Child Protective Services (CPS) and police. The ex parte order also awarded plaintiff exclusive possession of the marital home and ordered defendant to deposit \$6,000 per month into plaintiff's personal checking account for payment of household bills and expenses.

On December 6, 2012, the trial court entered a stipulated order that reduced defendant's obligation to pay for household expenses to \$950 per week, that continued the existing temporary custody arrangement and suspension of parenting time as reflected in the earlier ex parte order, and that did not obligate defendant to pay any child support. The order indicated that final determinations concerning custody, parenting time, and child support were reserved for trial.

Prior to trial, on August 20, 2013, defendant brought a motion seeking to set aside the stipulated order, arguing, in part, that material changes in circumstances warranted defendant having supervised parenting time. According to defendant's motion, a first-degree criminal sexual conduct charge brought by the county prosecutor was withdrawn by the prosecutor and the case was dismissed after the parties' daughter, being deemed competent to testify, failed to disclose any abuse by defendant during her testimony at defendant's preliminary examination on the charge. Defendant also asserted that the Department of Human Services, which had initiated a petition to terminate his parental rights, amended the petition to remove any allegations of sexual abuse and to delete the termination request, changing the protective proceeding to one with a goal of reunification. Defendant additionally contended in the motion that he underwent psychological examinations, which confirmed that he posed no risk to his children and should be allowed parenting time. The trial court held a hearing on the motion and denied the requested relief. The trial court noted that the issues were set for trial the following week.

The parties' divorce trial spanned eight days over a several-month period. Both parties testified, along with several experts. The trial primarily focused on custody and parenting issues, with the parties presenting evidence on the best-interest factors set forth in MCL 722.23. Testimony focused on whether defendant had a pornography or sexual addiction, whether he had exposed the children to pornography, and whether he posed a threat to sexually abuse the children. The evidence demonstrated that defendant had received counseling for pornography and sexual addiction earlier during the marriage.

On November 7, 2013, the trial court issued a written opinion, and a corresponding judgment of divorce was entered on January 17, 2014. The divorce judgment awarded plaintiff sole legal and physical custody of the children, suspended defendant's parenting time unless and until he complied with certain conditions, ordered defendant to pay plaintiff monthly spousal support of \$700 for three years, and ordered defendant to pay attorney fees in the amount of \$6,000 to plaintiff's attorney. With respect to the conditions set by the court relative to the possible lifting of the parenting-time suspension, the divorce judgment provided:

Defendant has the burden to show a change in circumstance that his disregard for the truth, his sexual and pornography addictions, and lack of regard for his children by pursuing his sexual arousal while parenting, have been resolved. Any counselor or psychologist in this pursuit shall be mutually agreed upon in writing by the parties and [p]laintiff shall have the opportunity to meet with this individual and provide a history. . . . The parties shall have 45 days from January 13, 2014[,] to select a counselor.

In this appeal, defendant first argues that the trial court erred in finding that an established custodial environment existed only with plaintiff and in ruling that the best-interest factors weighed in favor of awarding plaintiff sole custody. A custody judgment "shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Under the great weight standard, the trial court's findings should be affirmed unless the evidence clearly preponderates in the opposite direction. *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010); *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). In reviewing the findings, this Court defers to the trial court's credibility assessments. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). The "palpable abuse of

discretion” standard applies to the trial court’s discretionary rulings, such as a custody determination. *Fletcher v Fletcher*, 447 Mich 871, 879-880; 526 NW2d 889 (1994); *Shann*, 293 Mich App at 305. “An abuse of discretion with regard to a custody issue occurs ‘when the trial court’s decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias.’” *Mitchell*, 296 Mich App at 522 (citation omitted); see also *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006) (explaining that the old abuse of discretion standard from *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 [1959], although abrogated for the most part by *Maldonado v Ford Motor Co*, 476 Mich 372; 719 NW2d 809 [2006], still applies in custody matters for purposes of the “palpable abuse of discretion” language in MCL 722.28, given the Supreme Court’s ruling in *Fletcher*, 447 Mich 871). Questions of law are reviewed for clear legal error under MCL 722.28, and a trial court commits such an error when it “incorrectly chooses, interprets, or applies the law[.]” *Fletcher*, 447 Mich at 881; see also *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013).

MCL 722.27 provides, in relevant part:

(1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:

(a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child

. . .

(c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances The court shall not modify or amend its previous judgments or orders *or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.* [Emphasis added.]

In the context of a situation in which a temporary custody order is entered prior to a divorce trial followed by a custody award entered in a judgment of divorce, as here, a “trial court’s custody award resulting from the trial [is] the original custody award and not a modification or amendment of [the] existing [temporary] custody award[.]” therefore, there is no need “to determine whether . . . proper cause or a change in circumstances” was shown. *Thompson v Thompson*, 261 Mich App 353, 357-360; 683 NW2d 250 (2004). However, under those circumstances, the custody award in the divorce judgment still constitutes the issuance of a “new order” for purposes of custody and MCL 722.27(1)(c), thereby triggering the language in MCL 722.27(1)(c) regarding the established custodial environment. *Id.* at 361-362. Accordingly, here, if the established custodial environment of the children was properly found to

have existed with plaintiff as determined by the trial court, defendant had to have presented clear and convincing evidence at trial that it was in the children's best interests to change the custodial environment and award him custody or joint custody. "Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests." *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009) (citation omitted).

An established custodial environment is one of significant duration and contemplates "an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability and permanence." *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); see also *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). The provisions of a parenting time order do not alone establish the actual custodial environment. *Pierron*, 486 Mich at 87 n 3. In *Berger*, 277 Mich App at 706-707, this Court explained the affect that a temporary custody order may have on determining the established custodial environment:

The existence of a temporary custody order does not preclude a finding that an established custodial environment exists with the noncustodian or that an established custodial environment does not exist with the custodian. A custodial environment can be established *as a result of a temporary custody order*, in violation of a custody order, or in the absence of a custody order. [Citations omitted; emphasis added.]

The trial court found that there existed an established custodial environment with plaintiff, and we conclude that the court's finding was not against the great weight of the evidence. Although effectively the result of the temporary custody orders, the second of which defendant himself stipulated to, the children had been living with plaintiff for over one year without contact from defendant. While defendant testified that he previously provided the children with guidance, love, and support, the trial court was entitled to make credibility assessments and to consider the significant amount of time that defendant and the children were apart. Plaintiff testified that she provided for the children's physical and psychological needs during the year preceding trial. The children were young and reasonably looked to their mother for guidance, discipline, the necessities of life, and comfort during that period. Under these circumstances, the trial court's finding that an established custodial environment existed solely with plaintiff was not against the great weight of the evidence; the evidence did not clearly preponderate in the opposite direction.

The trial court also did not err in awarding plaintiff sole custody of the children. MCL 722.23 sets forth the factors to be considered in determining the best interests of a child:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

“A court need not give equal weight to all the factors, but may consider the relative weight of the factors as appropriate to the circumstances.” *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006).

The trial court analyzed the best-interest factors in its post-trial opinion. It found that while both parties loved the children, defendant demonstrated an inability to control his appetite for pornography and plaintiff showed greater commitment to caring for the children. The trial court concluded that the parties had equal capacity and disposition for love, affection, and guidance, but the evidence also demonstrated that defendant had questionable moral character. It found that the parties had equal family support in ensuring that the children’s needs would be met. The trial court further concluded that plaintiff had provided a more stable environment and custodial home. The trial court also found that plaintiff had greater moral fitness, noting that defendant was excommunicated from his church and lied about his finances and sexual and pornography addictions. The trial court ruled that the parties were equal concerning mental health. It recognized that plaintiff was reported to display paranoia, but the evidence suggested that it was normal under the circumstances. The trial court additionally found that defendant was untruthful and blamed plaintiff instead of taking responsibility for his actions. It further ruled

that the parties were equal concerning their willingness to facilitate the children's relationship with each other, determining that neither party would be so willing. The trial court found no evidence of domestic violence relevant to the analysis. The trial court placed the most importance on the circumstances surrounding the abuse and pornography allegations. It did not conclude that sexual assaults occurred, but it found that defendant exposed at least one of the children to pornography on many occasions.

The evidence at trial supported the court's best-interest findings. Plaintiff testified to the love, care, discipline, and guidance she provided the children. She also testified that she was providing them a stable and safe home environment and endeavored to continue to do so into the future. While the parties, and to some extent the experts, presented different versions or views of events, particularly the facts surrounding the allegations of abuse and defendant's use of pornography, it was up to the trial court to make credibility assessments and to weigh the evidence. *Shann*, 293 Mich App at 305. The trial court's opinion made clear that it found defendant incredible, noting instances of inconsistent testimony. At the same time, the trial court found plaintiff credible. Trial testimony supported the court's finding that defendant exposed his children to pornography. Several witnesses testified that defendant had acknowledged viewing pornography while caring for the children, at the very least during late-night feedings of the parties' son. Although defendant denied this, he admitted to watching adult-oriented movies containing nudity in the presence of the son. It was not against the great weight of the evidence for the trial court to conclude that defendant lacked credibility concerning key aspects of his care and treatment of the children and that the best-interest factors weighed in favor of granting plaintiff sole custody. Defendant certainly did not present clear and convincing evidence that a change in the established custodial environment was justified upon consideration of the best-interest factors. The "clear and convincing evidence" burden of persuasion is intended to erect a barrier against unwarranted and disruptive changes in custody, *In re Anjoski*, 283 Mich App 41, 53; 770 NW2d 1 (2009), and the burden was not met here.

Defendant also argues that the trial court erred in denying him parenting time. MCL 722.27a provides, in pertinent part:

(1) Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

...

(3) A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health.

Defendant points to the expert testimony of two psychologists in arguing that defendant's further separation from the children poses a risk that the children will suffer emotional harm based on feelings of abandonment. Both witnesses, however, testified that parenting time would be inappropriate in a case where a parent abused a child and refused to get counseling. One of

these experts added that parenting time would be inappropriate if a parent had exposed a child to pornography. In addition, a clinical social worker and a CPS investigator both testified that parenting time with defendant, even supervised visitation, was inappropriate and could lead to emotional harm. The trial court acted within its discretion in suspending defendant's parenting time. The trial court found that defendant lacked credibility and that he had exposed the children to pornography. There was no error in finding clear and convincing evidence that awarding defendant parenting time would endanger the children's mental or emotional health. The trial court did not indefinitely deny defendant parenting time. Under the circumstances, it was reasonable for the trial court to require defendant – through completion of therapy, psychological treatment, or otherwise – to show a change in circumstance such that he would not further expose the children to pornography.

Defendant next argues that the trial court erred in awarding plaintiff spousal support. In *Loutts v Loutts*, 298 Mich App 21, 25-26; 826 NW2d 152 (2012), this Court set forth the applicable standards governing an award of spousal support, observing:

It is within the trial court's discretion to award spousal support, and we review a spousal support award for an abuse of discretion. . . . An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case. We review for clear error the trial court's factual findings regarding spousal support. A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made. If the trial court's findings are not clearly erroneous, we must determine whether the dispositional ruling was fair and equitable under the circumstances of the case. We must affirm the trial court's dispositional ruling unless we are convinced that it was inequitable. [Citations and quotation marks omitted.]

The trial court's opinion expressed its findings regarding the length of the marriage (nearly 10 years), the conduct of the parties, the fault for the breakdown of the marriage, which the court attributed to defendant, the defendant's income, plaintiff's ability to work and earn money, and principles of equity. See *id.* at 31. Defendant was earning \$80,000 per year and plaintiff was not employed. It is true that plaintiff had a college degree and was fit to work. But she had been out of the workplace for several years and did not have an immediate earning potential. She had engaged in some effort to find employment, but was unsuccessful. We hold that the trial court's findings were sufficiently-detailed and not clearly erroneous and that, given the circumstances, an award of \$700 per month in spousal support for three years was fair and equitable and did not constitute an abuse of discretion.

Finally, defendant argues that the trial court erred in ordering him to pay attorney fees of \$6,000. In *Woodington v Shokoohi*, 288 Mich App 352, 369-370; 792 NW2d 63 (2010), this Court set forth the applicable standards governing an award of attorney fees in a divorce action, observing:

This Court reviews a trial court's decision to award attorney fees in a divorce action for an abuse of discretion. The findings of fact on which the trial court bases its decision are reviewed for clear error. A court in a divorce action may award attorney fees to enable a party to carry on or defend the action. MCR 3.206 provides that a party to a divorce action may request the trial court to order the other party to pay all or part of the party's attorney fees. The party seeking attorney fees must allege facts sufficient to show either that the party is unable to bear the expense of the action, and that the other party is able to pay, or that the attorney fees were incurred because the other party refused to comply with a previous court order, despite having the ability to comply. The party requesting the attorney fees has the burden of showing facts sufficient to justify the award. Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit. [Citations and quotation marks omitted; paragraphs restructured.]

The trial court ruled as follows concerning attorney fees: “Because of fault and the disparity of income, the Court orders that the defendant will pay \$6,000.00 towards plaintiff’s attorney fees directly to the attorney within 180 days.” The trial court did not clearly err in finding that defendant was at fault for the breakdown of the marriage and that there was a disparity in income. The trial testimony supported both findings.

Defendant argues that the trial court should have held an additional hearing on the issue of fees. We conclude that no further hearing was necessary. Plaintiff requested that the trial court order defendant to pay her attorney fees. She testified that friends and family members had helped her pay about \$6,000 in attorney fees, but she still owed roughly \$10,000 at the start of trial. Fees related to the eight-day trial were not included in plaintiff’s estimate of the amount she owed. There was testimony regarding the wide disparity in income and plaintiff’s poor prospects of finding employment. Under these circumstances, plaintiff presented facts sufficient to show that she was unable to bear the expense of the litigation and that defendant was able to pay. See MCR 3.206(C)(2)(a). The trial court acted within its discretion in ordering defendant to pay \$6,000 in attorney fees.

Affirmed. Having fully prevailed on appeal, plaintiff is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot